

Office of Chief Counsel  
Internal Revenue Service

memorandum

CC:LM:FSH:BOS:TL-N-3320-01  
BJLaterman

date: JUN 18 2001

to: Director, Area One  
SBSE Compliance - Technical Support:JH

Att: Manager, Team 1327, LMSB:CTM

from: Associate Area Counsel, LMSB, Boston

Subject:

Form 872

Taxable Years [REDACTED] and [REDACTED]

Statute of Limitations: [REDACTED]

This memorandum responds to your request of May 15, 2001 that we give advice regarding extending the statute of limitations for the above mentioned consolidated group's [REDACTED] and [REDACTED] taxable years. This memorandum should not be cited as a precedent.

[REDACTED] ([REDACTED]) is a Massachusetts corporation. It was the common parent of an affiliated group of corporations, which filed consolidated income tax returns for the taxable years [REDACTED] and [REDACTED]. [REDACTED] ([REDACTED]) is a Canadian corporation, which serves as the parent company of a number of subsidiaries with worldwide operations. One of [REDACTED]'s subsidiaries was [REDACTED] ([REDACTED]), a Michigan corporation.

On [REDACTED] [REDACTED] was acquired by [REDACTED]. The acquisition was effectuated as follows:

1. In part in exchange for a \$[REDACTED] note and in part as a capital contribution, [REDACTED] transferred an amount of its own stock (constituting less than [REDACTED] of its outstanding stock) to [REDACTED]
2. [REDACTED] also transferred to [REDACTED]
  - (a) cash sufficient to cover acquisition obligations with respect to fractional shares, and
  - (b) options to acquire a substantial number of [REDACTED] shares, with the intention that such options would ultimately be issued in the acquisition in exchange for outstanding stock options of [REDACTED]

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3. [REDACTED] formed a wholly-owned transitory [REDACTED] subsidiary (" [REDACTED] Newco") and transferred all of the [REDACTED] stock it had received in step 1, above, and all of the cash and options received in step 2, above, to [REDACTED] Newco; and
4. [REDACTED] Newco then merged with and into [REDACTED] with [REDACTED] surviving. In the merger (a) the [REDACTED] stock was issued to the former shareholders of [REDACTED], (b) the cash was issued for fractional shares of [REDACTED] stock, and (c) the stock options were exchanged for [REDACTED] stock options.

As a result of these transactions, [REDACTED] became a wholly-owned subsidiary of [REDACTED]. Those persons who were shareholders of [REDACTED] prior to the acquisition owned just over [REDACTED]% of [REDACTED] and the former shareholders of [REDACTED] owned just under [REDACTED]% of [REDACTED]. Pursuant to Revenue Ruling 74-565, 1974-2 C.B. 125, the acquisition was treated for U.S. federal income tax purposes, as if [REDACTED] acquired all of the stock of [REDACTED] in exchange for the stock of [REDACTED], in a stock for stock exchange that qualifies for tax-free treatment pursuant to I.R.C § 368(a)(1)(B). A Ruling was obtained from the National Office to the effect that no gain would be recognized in the acquisition under IRC §367. See P.L.R. 200021046 (February 28, 2000).

After the acquisition, both [REDACTED] and [REDACTED] changed their names to [REDACTED]. [REDACTED], now a wholly-owned subsidiary of [REDACTED], filed as a member of the [REDACTED] consolidated return. [REDACTED] retained the same EIN it had previous to the acquisition.

Generally, the common parent, with certain exceptions not applicable here, is the sole agent for each member of the group, duly authorized to act in its own name in all matters related to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given, shall be considered as having also been given or executed by each subsidiary. Treas. Reg. § 1.1502-77(a). Thus, generally the common parent is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members in the group. Treas. Reg. § 1.1502-77(a).

Treas.Reg. § 1.1502-77(c) provides that, unless the District Director agrees to the contrary, an agreement entered into by the common parent extending the time within which an assessment may be made in respect to the tax for a consolidated return year, shall be applicable to each corporation which was a member of the

group during any part of such taxable year. The common parent and each subsidiary, which was a member of the consolidated group during any part of the consolidated return year, is severely liable for the tax for such year. Treas. Reg. § 1.1502-6(a).

Temp. Reg. § 1.1502-77T provides exceptions to the general rule. Temp. Reg. § 1.1502-77T provides for alternative agents in certain circumstances and applies to waivers of the statute of limitations for taxable years for which the due date (without extensions) of the consolidated return is after September 7, 1988. Therefore, the regulation is applicable in this case.

Temp. Reg. § 1.1502-77T(a)(1) provides that the regulation applies if the corporation that is the common parent of the group ceases to be the common parent, whether or not the group remains in existence under Treas. Reg. § 1.1502-75(d). Furthermore, Temp. Reg. § 1.1502-77T provides that a waiver of the statute of limitations with respect to the consolidated group given by any one or more corporations referred to in paragraph(a)(4) of the section is deemed to be given by the agent of the group.

Subparagraph(a)(4)(i) lists as an alternative agent the common parent of the group for all or any part of the year, which the notice or waiver applies. In this case, the common parent, [REDACTED] is still in existence. Therefore, this paragraph applies and [REDACTED] is the agent for the [REDACTED] consolidated group for the taxable years [REDACTED] and [REDACTED].

Based on the foregoing discussion, we recommend that you obtain a Form 872 from [REDACTED]. The caption on the Form 872 should read: [REDACTED] [EIN: [REDACTED]] as agent for the members of the [REDACTED] consolidated group.\* On the bottom of the form you should add:\* This is with respect to the [REDACTED] consolidated group for the [REDACTED] and [REDACTED] taxable years. This form should be signed by an authorized officer or director of [REDACTED]. Rev. Rul. 83-41, 1983 C.B. 399, clarified and amplified by, Rev. Rul. 84-165, 1984-2 C.B. 305.

As a final matter, we recommend that you pay strict attention to the rules set forth in the Internal Revenue Manual (IRM). Specifically, IRM 121.2.22.3 requires use of Letter 907 (DO) to solicit the Form 872, and IRM 121.2.22.4.2 requires use of Letter 929 (DO) to return the signed Form 872 to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed Form 872 is received from the taxpayer the authorized manager should promptly sign and date it in accordance with Treas.Reg. § 301.6501(c)-1(d) and IRM 121.2.22.3. The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2

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and 4534. This includes Form 5348. In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Furthermore, please note that §3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. §6501(c)(4)(B), requires the Internal Revenue Service to advise taxpayers of their right to refuse to extend the limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Internal Revenue Service requests that the taxpayer extend the limitations period. To satisfy the requirement, Publication 1035, "Extending the Tax Assessment Period," must be given when you solicit the statute extension.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

If we can be of any further assistance, the undersigned can be reached at (617) 565-7855.

  
BARRY J. LATERMAN  
Special Litigation Assistant